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NOTES AND COMMENTS

The Crisis in Human Rights: Universalism and Culturalism Debate Revisited

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Introduction

Much of the twentieth century of the Christian Era (CE), especially its better half, stands justly hailed as the age of human rights. No preceding century in human history witnessed such a profusion of human rights enunciation on a global scale.¹ At a time when history is turning a new page and the lives of people are being exposed to newer challenges and unforeseen crisis, the entire human rights discourse has assumed anew meaning and understanding.² Human rights have been called the "common language of

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1 Upendra Baxi, *The Future of Human Rights*, 1 (2006). Allen Buchanan says "Future historians of moral and political philosophy may well label our period the Age of Rights." See, Allen Buchanan, "What is So Special About Rights?" *Social & Political Philosophy* 61(1984).2

2 HLA Hart distinguishes between a class of 'general rights' attributable to all men capable of choice in the absence of those special conditions which give rise to special rights. Human rights, if such a class of rights exists, are *general* in Hart's sense. If we try to locate the meaning of human rights in antiquity, we find that the term 'human rights' itself is of recent coinage, having been introduced with the UN Charter and the Universal Declaration. Its predecessors were the 'rights of man' and, of course, 'natural rights' — *ius naturale* and *lex naturalis*. According to Hoffman, "The 'rights of man' and 'natural rights' were used contemporaneously in different fora. 'Natural rights' remained the term of choice in moral philosophy, whereas the 'rights of man' came to be associated with constitutionalism and political theory. There is, of course, a subtle difference between the two terms, notably in their approach to universality; while both allude to the innate faculties of human beings as such, 'natural rights' have a distinctly metaphysical, if not theistic, undertone to them, in which 'nature' connotes the necessary and non-contingent character of rights which are neither creations of, nor subject, to human will; the 'rights of man', in turn, while still clearly derived from 'natural rights', nonetheless already point to a 'community of men', a form of citizenship of humanity, membership in which is simply the primary attribute of 'men', with any metaphysical cause being of secondary importance." See, Florian F. Hoffmann, "Human Rights and Political Liberty", 9 *Int'l Legal Theory* 105(Fall, 2003).

humanity".³ However, the notion of human rights as being universal and sharing commonality across the geographical limitations stands beset today with emerging arguments that challenge the universality concept. In short, the notion of human rights stands challenged today.⁴ The virtue of universality attached to human rights is faced with great opposition by the 'Cultural Relativists'. In notional terms, 'cultural relativism' asserts the primary role of culture or society vis-à-vis human rights. In other words, "the individual realizes his personality through his culture; hence respect for individual differences entails a respect for cultural differences."⁵ In this regard, the present paper reflects upon and debates the antagonistic emerging notions of universalism and relativism that have swept much of the discussions concerning human rights.

The Notion of Universality

Universality of human rights symbolizes universality of collective human aspiration to make power more accountable, governance progressively just and state incrementally more ethical.⁶ The 'universal theory' of rights reflects a slowly developing idea of the 'whole human race' as a community or 'a vast legal association', reflective of the need for a uniform minimum guarantee to individuals of their security, participation and protection in society. The phrase *universal human right* is used to assert that universal norms and standards are applicable to all human societies because human rights are absolute, inalienable, unalterable and internal. The theory is an extension of the theory of natural law that proposes of natural rights as deriving from nature and not from society or history.

Modern conceptions of human rights have their origin in the idea of natural rights. Central to the doctrine of natural rights is a combination of a basic conception of equality with the idea of value monism: human nature is essentially uniform; all human beings are held to share the same ends that do not only determine moral rights and duties, but from which some laws too derive their objectively valid authority. Natural rights, on this view,

3 See, *Supra* note 1 at 1.

4 For example Prof. B B Pande argues that "... there are...sharp differences in the ways in which human rights are projected and professed to be achieved." He says the western countries, particularly those belonging to the capitalist orbit; believe in the recognition of human rights through international declarations, covenants and conferences etc while those belonging to the communist orbit believe the western model of human rights to be mere paper guarantees. See, B B Pande, "Rights of Beggars and Vagrants", in Upendra Baxi(Ed), *The Right to Be Human*, 116 (1987).

5 Henry J. Steiner and Philip Alston, *International Human Rights in Context*, 341 (2000).

6 *Supra* note 1 at 185.

essentially connote the enabling conditions for the attainment of the moral ends shared by all human beings. For natural rights theorists these rights are objective in as much as the ultimate human end is objectively true and not in question. Since the human legal order must not be contrary to men's final ends, a law which is contrary to natural right is no law. It may be enforced, but it lacks legitimacy. "Natural rights theories thus imply both moral objectivism and value monism, that is, the beliefs that moral values represent objective truths that do not conflict, but are harmonious or at least hierarchically ordered."⁷ The distinguishing feature of Natural Rights Theory is undeniably best expressed or captured by The Declaration of Independence by the United States of America, providing;⁸ "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of happiness."

The passage of time has witnessed incorporation of these rights in various international documents, one of the prominent declaration of these rights being the Universal Declaration of Human Rights (hereinafter UDHR), 1948 was adopted to affirm human values of each individual human being, which are inherent, inalienable, indivisible and interlinked.⁹

One of the several arguments put forth supporting universalism is that human rights are those rights that one has simply being a human being, and they are held by all human beings irrespective of their status. They have a universal appeal that transcends geographical boundaries. And these rights a person has against all other persons and institutions. One such right is the right to human dignity. It will serve the purpose of discussion if we analyze

7 Gunnar Beck, "The Idea of Human Rights between Value Pluralism and Conceptual Vagueness", 25 *Penn St. Intl L. Rev* 615 (2007).

8 Emmanuel Q Fernando, "Natural Rights Legal Theory", 74 *Philippine Law Journal* 2 at 6 (1999).

9 The UDHR serves as a significant platform for all nations and its people, to protect and realize the fulfillment of the basic rights of mankind. It is a declaration of some of the basic rights to which a person is entitled irrespective of his status, and it came into being when the world was facing one of the gravest crisis of human rights. It was a direct spin-off of the Second World War which witnessed atrocities and violation of human rights on such a large scale that beggars description. Declaration proved to be epoch-making, if we see it in the light of developments that ensued. In fact, it forms the high water mark in the evolution of human rights in recent times. In the period that followed the declaration, human rights movement developed by leaps and bounds touching almost every aspect of human life. David Kennedy argues that "human rights movement has unquestionably done a great deal of good, freeing individuals from harm and raising the standards by which the governments are judged".

the right to human dignity in light of its universal acceptance.¹⁰ Human dignity presents one of the core aspects of human rights. It is one of the prerequisites of living a life which is worth living, and which forms the heart and soul of human life. Dignity is something that is granted at birth or on incorporation into the community as a concomitant of one's particular ascribed status.¹¹ Part of the human dignity of a human being consists of the quite endurance and acceptance of what a human rights approach to the world would consider injustice or inequality.¹² The notion of dignity accompanies the very notion of human life, and pervades the thinking in every society. Due emphasis given to it in the various legal systems around the world is reflective of its acceptance as a universal idea and virtue sans which the entire meaning of human rights loses its life and sanctity. It can be argued that dignity of a human being and its due importance finds acceptance in the varying cultural set-ups globally.

Cultural Relativism

The debates on human rights most often reflect upon a "legitimation crisis" for human rights, in relation to the clash between *universality* and *relativity* of human rights. On the one hand, *universality of human rights* rest on a conception of human beings having certain universal rights regardless of legal jurisdiction and irrespective of whether these rights are recognized in positive law. While on the other hand, relativism is ultimately incompatible with any belief in human rights as anything more than a diluted set of historically and culturally contingent dominant values in certain places at certain times. 'Opponents to universalism admit that rights are drawn from human nature, but assert that human nature is not an abstraction, because humans are defined by their relation to others and as part of a society of like minded people. A human person is not separate from, or above, society. Since societies vary from culture to culture, evaluations are relative to the cultural background out of which they arise; a society or culture cannot be criticized on the basis of external value'.¹³ For instance, the right to dignity is not a value free unchangeable phenomenon.

10 Article 1 of the UDHR reads; "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in as spirit of brotherhood."

11 *Supra* note 5 at 399.

12 *Ibid.*

13 Yash Ghai, "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims", 21 *Cardozo L. Rev.* 1095-1102 (2000).

The doctrine of cultural relativism holds that moral rules and social institutions evidence an astonishing cultural and historical variability and (at least some) such variations are exempt from legitimate criticism by outsiders.¹⁴ In the context of the debate the viability of international human rights, cultural relativism may be defined "as the position according to which local cultural traditions (including religious, political and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals as in a given society. A central tenet of relativism is that no trans-boundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable."¹⁵

The Politics of Culture

The reason we need to understand culture in light of human rights protection is because culture just like religion is not a harmless concept. They are institutions; a part of the organization of society. Usually, people advocating the view; reduce it to an individual level and individual choice. But in reality, culture is part of the institution of the ruling class. The concern however is, how can human rights be reconciled with the clash of cultures that has come to characterize our time? As now and always, cultural background is one of the primary sources of identity. It is the source for a great deal of self-definition, expression, and sense of group belonging. As cultures interact and intermix, cultural identities change. This process can be enriching, but disorienting. The current insecurity of cultural identity reflects fundamental changes in how we define and express who we are today.

The debate over universal rights and cultural relativism would compel us to question as to whether universal human rights can exist in a culturally diverse world, or as the international community becomes increasingly integrated, how can cultural diversity and integrity be respected? The 'cultural theory' asserts that human values, far from being universal and fundamental, vary a great deal according to different cultural perspectives. Some would apply this relativism to the "promotion, protection, interpretation and application of human rights which could be interpreted

14 Jack Donnelly, "Cultural Relativism and Human Rights", *Human Rights Quarterly*, Vol. 6, No. 4 Nov., 1984. Also available at <http://www.jstor.org/page/info/about/policies/terms.jsp>

15 It is often said, that all cultures are coexisting and equally valid patterns of life, which mankind has created for itself from the raw materials of existence. Each culture is self-contained, autonomous, separate but equal. Each makes sense in its own context, and all you have to do is know the context to understand what the people are doing and why they're doing it.

differently within different cultural, ethnic and religious traditions.”¹⁶ Some would advocate that this relativism would pose a dangerous threat to the effectiveness of international law and the international system of human rights. If cultural tradition alone governs State compliance with international standards, then widespread disregard, abuse and violation of human rights would be given legitimacy. The actual promotion and protection of human rights perceived as culturally relative would only be subject to State discretion, rather than international obligations. By rejecting or disregarding their legal obligation to promote and protect universal human rights, States advocating cultural relativism could raise their own cultural norms and particularities above international law and standards.

In response to this, it has been advocated, that universal human rights do not impose one cultural standard, rather a legal standard of minimum protection necessary for human dignity. The United Nations standard adopted refers to the universal human rights emerging from the consensus of the international community, and not the cultural perspective of any particular region. Universal human rights reflect the dynamic efforts of the international community to achieve and advance a common standard to protect human dignity.

In almost all societies, every person has a right to culture, subject to reasonable restrictions. The right to culture is limited at the point at which it infringes on another human right. The right does not permit violations or abridgement of other human rights. “(It) means that cultural rights cannot be invoked or interpreted in such a way as to justify any act leading to the denial or violation of other human rights and fundamental freedoms. As such, claiming cultural relativism as an excuse to violate or deny human rights is an abuse of the right to culture.”¹⁷

What emerges is:

- (a) Universal human rights are not intrusive and disruptive to cultural perspectives. In fact they leave ample space for adjusting to cultural relativism, only for the efficacious enhancement of the rights.
- (b) Cultural rights cannot justify torture, murder, genocide, discrimination on grounds of sex, race, language or religion, or violation of any of the other universal human rights and fundamental

16 See Publication by the United Nations Department of Public Information *DPI/1627/HR-March 1995*.

17 *Ibid.*

freedoms established in international law. There can be no attempts to justify such violations on the basis of culture have no validity under international law.

There is more often an assertion that traditional culture is sufficient to protect human dignity, and therefore universal human rights are unnecessary. Because when culture effectively provides protection, then human rights by definition would be compatible, posing no threat to the culture. As such, the culture can absorb and apply human rights, and the governing State should be in a better position not only to ratify, but to effectively and fully implement, the international standards.

Nevertheless, cultural context is relevant so far as it directs how human rights must be established, integrated, promoted and protected. Human rights are to be approached in a way that is meaningful and relevant in diverse cultural contexts. Instead of advocating for a cultural understanding of human rights, the universality of cultural relativism must be accepted. "It would effectively emphasize upon the common, core values shared by all cultures: the value of life, social order and protection from arbitrary rule. These basic values are embodied in human rights."

Such an approach would:

- (a) Promote greater respect for and observance of human rights.
- (b) Draw on compatible practices and common values from traditional cultures to enhance and advance human rights promotion and protection.
- (c) Encourage greater tolerance, mutual respect and understanding, and also foster more effective international cooperation for human rights.
- (d) Facilitate, rather than reduce, human rights respect and observance by recognition and appreciation of particular cultural contexts.
- (e) The state also has the obligations to protect the cultural expression of rights. The Bangkok Declaration in 1993¹⁸ put forth, that human rights must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds. Since the states have the primary responsibility for the promotion and protection of human rights, and

¹⁸ Available at http://www.etikk.no/globaljustice/papersGJ2003_Follesdal_Human_Rights_and_Relativism.doc (Last visited on 15.9.08).

the primary responsibility to remedy human rights violations, it falls to the government to determine trade offs where appropriate, and secure rights through such institutions as each government decides. It is also true that internally, human rights spell out some of the minimal conditions of domestic legitimacy. That is human rights are necessary though not sufficient conditions for granting a government a valid moral claim that citizens should respect its decisions. A government must secure human rights for a population to be morally bound to obey.

The 'Universality' theory offers a rational approach to matters state and human conduct. It may reflect upon the traditional cultures—at least the sorts of traditional cultures that would readily justify cultural deviations from international human rights standards, so that people are not victims of the arbitrary decisions of rulers whose principal claim to power is their control of modern instruments of force and administration. In addition, it cannot be denied that in traditional cultures, communal customs and practices usually provide each person with a place in society and a certain amount of dignity and protection. There usually are well-established reciprocal bonds between rulers and ruled, and between rich and poor.¹⁹

Challenge to Politics of Universality

The widely quoted challenge to universality of human rights was witnessed at the 1993 UN Conference on Human Rights held in Vienna,²⁰ wherein a delegation led by China, Syria and Iran were active participants: The arguments put forth are worth mentioning here; (a) Human Rights as currently defined are not universal but based on Western morality. The Universalist theory of Human Rights is indeed largely based on Western philosophy and the value it places on the individual.²¹ According to this philosophy, all humans have rights by virtue of their humanity, a person's rights cannot be conditioned by gender or national or ethnic origin, human Rights exist universally as the highest moral rights, so no rights can be subordinated to another person or an institution (e.g. the state). (b) Owing

19 The human rights violations of most Third World regimes are as antithetical to such cultural traditions as they are to "western" human rights conceptions. In fact, authentic traditional cultural practices and values can be an important check on abuses of arbitrary power.

20 Available at <http://userwww.sfsu.edu/~sclavier/research/hrdebate.pdf>. (last visited on 15.9.08)

21 A product of Greek philosophy, Christianity and the Enlightenment thinkers, the Universalist approach to Human Rights contends that one can use nature, God, or reason to identify basic rights, inherent to every human.

to their Western origin, they should not therefore be imposed as norms on non-western societies in disregard of those societies' historical and economic development and in disregard of their cultural differences and perceptions of what is right and wrong. Furthermore, the imposition of one's standard on another culture is unjust and imperialist in nature. (c) The next contention by the 'cultural relativism' proponents was in reference to the ICCPR²². According to them, it is a perfect reflection of the European Enlightenment: Hobbes, Locke, Montesquieu, and Rousseau are its spiritual founding fathers. Indeed the Covenant insists on "negative" rights, those that limit the role of government and prevent its intrusion in one's life, privacy, and freedom of speech, religion, opinion and association.²³

If at all, universality is anti-culture, the next issue of concern is: Whether the cultural relativist discourse is agenda-free? It has been asserted that cultural relativism's most fundamental weakness in the work towards human rights lies in the conflict of interest between the people who articulate the argument and those they represent. More often than not, cultural relativism is claimed by repressive regimes whose practices have nothing to do with local or indigenous cultures but more with their own self-preservation. Cultural policymakers are those who can speak for the group and articulate the group values to the outside world. Cultural relativism as a tool is a legitimization of a behavior designed to preserve a structure of powers.

To come to a compromise, it cannot be denied that there exist profound differences of perceptions among cultures or groups of people according to

22 The International Covenant on Civil and Political Rights, 1966.

23 Political liberalism thus defined has been the force underlying the US Constitution and the US Bill of Rights, the French Declaration of the Rights of Man and Citizen and the French Constitution. It is also the emphasis of the International Human Rights legislation and thus legitimizes the efforts by the West to spread or impose Western models of democracy. It is important to look to the history of political liberalism and its expression in the modern Human Rights doctrine. Central to a western definition of fundamental freedoms is the right to property. Economic liberalism and political liberalism are brothers. Critics agree that the Universalist discourse barely hides a Western attempt to give a moral legitimization to an economic agenda. The ultimate contradiction lies in the fact that political liberalism has supported the same economic liberalism that has legitimized, for example, the Structural Adjustment Programs of the IMF. The SAPs in turn have been the catalyst for the curtailment of political freedoms and human rights in many developing countries. As has been passionately stated: Christianization, civilization, democratization: the rhetoric has changed, the interference has not. Furthermore, there is still the underlying concept that Western culture, because it legitimizes itself behind its pretension to universality, also positions itself as superior to non-western culture. See *supra* note 14.

their history, language, and economic circumstances. But there is a possibility of identifying some common points. Merely disagreeing with the content of what is now presented as universal does not have to mean that there are no values or norms universally agreed upon. Western values may not be universal but it does not mean that universal values do not exist. What is required is a true cross-cultural search of what can be universally agreed upon. Universal standards should be the goals while cultural legitimacy would offer a method. The search of commonalties would (in theory) bypass the structures of power. It could forge a necessary dialectic between external attempts to build a universal system and the internal assistance of various civil societies.

While human rights—inalienable entitlements of individuals held in relation to state and society—have not been a part of most cultural traditions, or even the western tradition until rather recently, there is a striking similarity in many of the basic values that today we seek to protect through human rights. This is particularly true when these values are expressed in relatively general terms. Life, social order, protection from arbitrary rule, prohibition of inhuman and degrading treatment, the guarantee of a place in the life of the community, and access to an equitable share of the means of subsistence is central moral aspirations in nearly all cultures.

Conclusion

Moral rules, including human rights, function within a moral community. In order to preserve complete universality for basic rights; the solution can not be an absolute Universalist priority over the demands of the moral community. It cannot be denied, that traditional discussions of the controversy on universalism and relativism are conducted in ideological terms, with little attention to actual state practices. In practice, culture may generally connect with religion, history, values and more broadly with the way people live. No community has a static culture. Rights consciousness itself moulds and reflects in culture.

The modern state, the modern economy, and associated “modern” values tend to create communities of relatively autonomous individuals, who lack the place and protections provided by traditional society. Furthermore, regardless of the relative degree of individual autonomy, people today face the particularly threatening modern state, and the especially fierce buffeting of the ever-changing modern economy. Rights held equally by all against the state, both limiting its legitimate range of actions and requiring positive protections against certain predictable economic, social, and political contingencies, are a seemingly natural and necessary response to typically

modern threats to human dignity, to basic human values, traditional and modern alike.

Although, the potential for conflict in a large number of states between the objectives of several human rights treaties, on the one hand and cultural practices on the other hand, is a salient contemporary concern. The critique to universalism has always been twofold. Firstly, universalism is often identified with the expansionist policies of capitalism. The idea has always been to unify the globe in order to promote the free market oriented policy of governance and perpetuation of liberal Western values. As rightly said; "Globalization in general, modernity in particular, has been not only bring in individualism and individual rights, but also awakening the collective and group rights, such as human rights of women, children, ethnic minorities, indigenous peoples, etc. Globalization has not only brought global values, such as liberalism, democracy and human rights, to traditional societies, it has caused to the violations of human rights as well. In this sense, that the economic globalization has subsequently resulted to cultural and legal globalization is a process by which global values have been imposed on the modern world. Universality of human rights (or universal human rights) has been both welcomed and rejected, more or less, in every country."²⁴

In addition, the 'legitimation crisis', or the criticism to universality is based upon the continued violations of human rights and freedoms at the international level. The world has been a witness to blatant interruptions and violations. In that case, each concept is valid primarily where it was conceived. 'If we want to extend its validity beyond its own context we shall have to justify the extrapolation...To accept the fact that the concept of human rights is not universal does not yet mean that it should not become so.'²⁵

24 Nghia Hoang, "Human Dignity and Fundamental Freedoms- Global Values of Human Rights: A Response to Cultural Relativism", Available at www.ssrn.com

25 *Supra* note 5 at 385.